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No. 04-308

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARTIN PRUITT, LUCRETIA PRUITT, DAVID ELGIN, DANIEL LLEWELLYN AND CHERYL LLEWELLYN,

Petitioners,

v.

COMCAST CABLE HOLDINGS, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit err in determining that numerical data electronically stored in Respondent's digital cable converter boxes is not "personally identifiable information," as that term is used in the subscriber privacy provisions of the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 551, where Petitioners did not allege that the collection of personal information in Respondent's billing system violated the Cable Act, Petitioners conceded that the data stored in the converter boxes does not contain the name, address or any information regarding customers, and the Tenth Circuit found that the data stored in the converter boxes is merely a series of numbers?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent hereby discloses that Comcast Cable Holdings, LLC, formerly known as AT&T Broadband, LLC, is a subsidiary of Comcast Cable Communications Holdings, LLC, which is a wholly-owned subsidiary of Comcast Corporation. Comcast Corporation is a publicly-held company. No other publicly-held entity owns ten percent or more of Comcast Cable Holdings, LLC.

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STATEMENT OF THE CASE

Petitioners' federal claims were brought under the subscriber privacy provisions of the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 551. Petitioners' Amended Complaint did not allege that Respondent improperly collected, used, disclosed or retained any personally identifiable information about Respondent's cable television subscribers, such as names, addresses, social security numbers, credit histories, etc., that Respondent collects in the normal course of business and keeps in its billing system. Instead, Petitioners' claims focus on the digital cable converter boxes in subscribers' homes through which, *inter alia*, a subscriber may purchase a Pay-Per-View ("PPV") movie or event. The converter boxes store in their electronic memory certain numerical data regarding PPV purchases. *See* Appendix to Petition for Writ of Certiorari ("App.") 10a. This case does not involve any claim that Respondent improperly *collected* or *used* the data stored in the converter boxes. Indeed, collecting and using such data is necessary to render the PPV service to subscribers, and is expressly authorized by the Cable Act. *See* 47 U.S.C. § 551(b)(2). This case solely involves the allegation that Respondent *retained* the data in the converter boxes longer than was necessary because the converter boxes are programmed to retain the data for sixty-four purchases before the oldest data is overwritten by a subsequent purchase. *See* App. 11a. The District Court concluded that the information in the converter boxes is not "personally identifiable information" subject to § 551, and granted summary judgment for Respondent. *See* App. 22a. The Court of Appeals affirmed. *See* App. 8a.

The record evidence included testimony "that the information stored on the cable converter boxes is raw data, consisting of a series of numbers and letters." App. 20a. For example, the data on one PPV purchase looks like this if printed out from the converter box: "06 3A 9B 26 1C E0 28 3A 9B 00 62 21 C4 33 63 BB 5D 16 0E 62 CD 00." Exhibit A to Declaration of Kevin Taylor, Appendix to Appellant's Brief (in Court of Appeals Case No. 03-1297), p. PA 134. The District Court found that "the cable converter boxes contain absolutely no information about even the subscriber's identity, much less further information about the subscriber's viewing habits or other personal information." *Id.* The District Court concluded that "even if all the information contained in the cable converter boxes was printed on the front page of the newspaper, it [would] offer no information about the subscriber or his or her viewing habits or other personal decisions." App. 20a-21a.

The District Court rejected Petitioners' argument that the data in the converter boxes should be considered to be personally identifiable information merely because the "unit address" of a particular converter box can be related to a particular customer in Respondent's billing system. *See* App. 21a. "Only in [Respondent's] billing system is the unit address and the user's account connected so that billing can occur." *Id.* The District Court found it significant that Petitioners' complaint "deals solely with 'the information collected and stored by the converter boxes.'" *Id.* (quoting Am. Compl. ¶¶ 1-43). "Plaintiffs have not made any allegations that [Respondent's] billing system violates the Cable Act." *Id.* Thus, the District Court concluded that the information at issue in this case is not "personally identifiable information." App. 21a-22a. Since

the Cable Act's privacy provisions only pertain to "personally identifiable information," *see* 47 U.S.C. § 551, the District Court granted summary judgment for Respondent.

The Court of Appeals agreed with the District Court's factual findings, and the outcome dictated by those factual findings. The Court of Appeals stated that "[e]ach converter box contains a code displayed in hexadecimal format indicating the date of a pay-per-view purchase and a source identifier for the pay-per-view channel,"[1] and other codes, also in hexadecimal format, "signifying the total number of purchases and payments generated through that particular box." App. 3a. The Court of Appeals agreed with the District Court that "the converter box code – without more – **provides nothing but a series of numbers**." App. 6a (emphasis added). The Court of Appeals noted that Petitioners "concede the information in the converter boxes does not contain the name, address or any information regarding the customer." App. 5a. While recognizing that Respondent's billing system contains personally identifiable information about cable customers, the Court of Appeals emphasized that "[Petitioners] made no claim in their briefs or at oral argument that the collection of information in the billing system violates the Cable Act." App. 6a. Furthermore, Petitioners

[1] Petitioners misstate the Court of Appeals' findings. Petitioners state that "[t]he information collected by and stored in the converter boxes reveals the dates and times of pay-per-view purchases and the pay-per-view channels watched." Petition for Writ of Certiorari ("Pet.") at 2 (citing App. 3a). In fact, it does not reveal dates, times or channels watched. As the Court of Appeals found, the data in the converter boxes is merely "a code displayed in hexadecimal format." App. 3a. By itself, that code reveals nothing but a series of numbers. *See* App. 6a.

never alleged "that the retention of data in the billing . . . system[] violates the Cable Act." App. 7a. Given these facts, and these concessions by Petitioners, the Court of Appeals affirmed the summary judgment entered in favor of Respondent. *See* App. 8a.

REASONS FOR DENYING THE PETITION

There is no compelling reason for the Court to review the decision below. The Tenth Circuit's decision does not conflict with a decision of this Court, any Court of Appeals, or any other court. Petitioners' attempt to portray this case as one where the Court of Appeals has decided an important question of federal law that should be decided by this Court rings hollow. In fact, the decision below simply represents the Tenth Circuit's application of a properly stated rule of law to the specific facts before it.

I. The Decision Below Is Fact-Specific

The Court of Appeals' decision was based on the specific facts of this case. Based on the depositions, affidavits and other evidence in the record, including the exhibit to Mr. Taylor's Declaration showing the data at issue looks like "06 3A 9B 26 1C E0 28 3A . . . ," Appendix to Appellant's Brief below at p. PA 134, the Tenth Circuit agreed with the District Court that the information at issue in this case – the PPV data stored in the converter box – "provides nothing but a series of numbers." App. 6a. This factual finding is not worthy of review by this Court.

The facts also dictated the rejection of Petitioners' argument that the numbers in the converter boxes are

"personally identifiable information" because they can be associated with a specific subscriber in Respondent's billing system. The unit address "identifies only the particular cable converter box, but not the particular user." App. 21a. Moreover, the Court of Appeals found:

> Without the information in the billing . . . system one cannot connect the unit address with a specific customer; without the billing information, even Comcast would be unable to identify which individual household was associated with the raw data in the converter box. Consequently, it is the billing system that holds the key to obtaining personally identifiable information, not the converter box.

App. 6a. This finding also is so fact-bound that it simply is not appropriate for this Court's review.

II. There Is No Need For This Court To Define The Term "Personally Identifiable Information"

The Cable Act does not expressly define the term "personally identifiable information." It does, however, provide that "the term 'personally identifiable information' does not include any record of aggregate data which does not identify particular persons." 47 U.S.C. § 551(a)(2)(A). Furthermore, the Cable Act's "legislative history states that personally identifiable information 'would include specific information about the subscriber, or a list of names and addresses on which the subscriber is included.'" *Scofield v. TeleCable of Overland Park, Inc.*, 973 F.2d 874, 876 n.2 (10th Cir. 1992) (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 79, 1984 U.S.C.C.A.N. 4655, 4716).

Petitioners present no compelling reason why this Court should address the meaning of the term "personally identifiable information." The definition of that term is sufficiently clear. Both the Court of Appeals and the District Court had no trouble understanding its meaning. *See* App. 4a-5a; App. 19a-20a. Petitioners cite only two reported cases addressing the term. *See* Pet. at 5 (citing *Scofield*, 973 F.2d 874 and *Metrovision of Livonia, Inc. v. Wood*, 864 F. Supp. 675 (E.D. Mich. 1994)).[2] The dearth of cases on this issue strongly suggests that it is not of sufficient importance to require this Court's attention. In any event, this Court's jurisprudence suggests that this Court should not address this issue until it is more developed in the lower courts.

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[2] Petitioners suggest that there is a "conflict" between *Scofield* and *Metrovision*. *See* Pet. at 5. Not so. Both *Scofield* and *Metrovision* cited the Cable Act's legislative history regarding its privacy provisions. *See* 973 F.2d at 876 n.1; 864 F. Supp. at 681. It is true, as Petitioners state, *see* Pet. at 5, that the *Metrovision* court suggested that information on what cable programs a particular subscriber watched would implicate the Cable Act's privacy provisions. However, Petitioners paint with far too broad a brush when they assert that this "is [the] exact same type of information which is at issue in this matter." Pet. at 5. This completely ignores the fact that the *only* information at issue in this case – the raw data stored in Respondent's converter boxes – is "nothing but a series of numbers," App. 6a, which if published on the front page of the newspaper would reveal "no information about the subscriber or his or her viewing habits or other personal decisions," App. 21a. Petitioners' argument also ignores the fact that the unit address of the converter box "identifies only the particular cable converter box, but not the particular user." App. 21a. The record makes clear that the data at issue in this case implicates no legitimate privacy concerns.

III. Petitioners Misstate the Impact of the Decision Below

Petitioners' arguments that the decision below will nullify the privacy provisions of the Cable Act and impose heightened pleading requirements to assert Cable Act claims are without merit.

A. The Decision Below Does Not "Nullify" Privacy Protections

Petitioners suggest that the decision below allows a cable company to circumvent the Cable Act's privacy provisions by linking personal information "to subscribers' names and addresses by means of some identifier such as a unit address or an account number, rather than store it in the same physical record." Pet. at 6. That assertion both ignores the facts of this case and states too much. Petitioners cannot escape the fact that they *chose* to bring only narrow claims solely concerning the PPV data stored in the converter boxes. However, nothing in the decision below would prevent other cable subscribers from suing a cable company for collecting, using, disclosing or not destroying personally identifiable information in violation of § 551, regardless of how it was identified or where it was stored. The decision below in no way undermines subscriber privacy. Rather, the decision below acknowledges the simple fact that the series of numbers stored in the converter boxes in this case is not personally identifiable information under the Cable Act.

B. The Decision Below Does Not Require "Bad Faith" Allegations

Petitioners misstate the decisions below and incorrectly suggest that the District Court and the Court of

Appeals held that Petitioners were *required* to allege that retaining subscribers' names and addresses in the billing system violated the Cable Act. *See* Pet. at 7. That is not correct. In fact, neither court below said such allegations were *required*; they simply pointed out that in this case, Petitioners *chose* not to make any such allegations. *See* App. 21a; App. 7a. Petitioners cannot blame the District Court and the Court of Appeals for their own decision (which was dictated by the facts of this case) not to make any allegations that Respondent mishandled any personal information in its billing system.

C. The Decision Below Does Not Violate Rule 8(a)

Petitioners' final argument is that the Court of Appeals' decision somehow violates the notice pleading standard of Fed. R. Civ. P. 8(a). *See* Pet. at 7-8. This argument rests on a fundamental misstatement of the basis for the decisions below. This case was not, as Petitioners suggest, *see* Pet. at 3, decided at the pleading stage on a motion to dismiss. Rather, after depositions, discovery and the submission of affidavits and other evidence, this case was decided on summary judgment under Fed. R. Civ. P. 56. *See* App. 22a. There is simply nothing but hollow air to Petitioners' attempt to suggest that the decision in this case implicates Rule 8(a) or imposes a heightened pleading standard for Cable Act privacy claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: November 3, 2004.

Respectfully submitted,

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